IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
JUN 25 1975

No. 74-1485

WILLIAM ENGLISH, JR.,
*Petitioner*

v.

HON. ALEXANDER A. LAWRENCE, Chief Judge, United States District Court for the Southern District of Georgia; SEABOARD COAST LINE RAILROAD COMPANY; and BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
*Respondents*

## BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN W. WELDON
EDWARD A. CHARRON
SEABOARD COAST LINE RAILROAD COMPANY
500 Water Street
Jacksonville, Florida 32202

MALCOLM MACLEAN
CHARLES A. EDWARDS
HUNTER, HOULIHAN, MACLEAN, EXLEY, DUNN & CONNERAT, P. C.
Post Office Box 9848
Savannah, Georgia 31402

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

# INDEX


| | Page |
|---|---|
| INDEX | I |
| TABLE OF AUTHORITIES | III |
| OPINION BELOW | 1 |
| QUESTION PRESENTED | 2 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | |
| I. THE TRIAL COURT'S HANDLING OF THIS CASE IS JUSTIFIED BY THE FACTS | 6 |
| II. THE COURT OF APPEALS DID NOT ERR IN DENYING PETITIONER'S APPLICATION FOR MANDAMUS | 9 |
| III. PETITIONER HAS SHOWN NO GROUNDS SUFFICIENT TO JUSTIFY THE GRANTING OF HIS PETITION FOR CERTIORARI | 12 |
| CONCLUSION | 12 |
| APPENDIX | |
| 1. *Hayes* v. *Seaboard Coast Line Railroad Company*, Order dated Dec. 9, 1968. (S.D. Ga.) | 1a |
| 2. *Hayes*, Order dated Jan. 14, 1969. (S.D. Ga.) | 12a |
| 3. *Hayes*, Order dated Apr. 9, 1971 (S.D. Ga.) | 17a |
| 4. *Hayes*, Order dated Aug. 20, 1971 (5th Cir.) | 20a |
| 5. *English* v. *Seaboard Coast Line Railroad Company*, Order dated Aug. 17, 1971 (S.D. Ga.) | 22a |
| 6. *English*, Order dated Sept. 7, 1971 (S.D. Ga.) | 27a |
| 7. *English*, Order dated Jan. 28, 1972 (S.D. Ga.) | 30a |
| 8. *English*, Order dated Aug. 7, 1972 (5th Cir.) | 33a |
| 9. *English*, Orders dated Sept. 1, 1972, Oct. 18, 1972, and Oct. 24, 1972 (S.D. Ga.) | 44a |
| 10. *English*, Order dated Nov. 16, 1973 (S.D. Ga.) | 48a |

INDEX—Continued


| | | Page |
|---|---|---|
| 11. | *Hayes*, Order dated Nov. 19, 1973 (S.D. Ga.) | 52a |
| 12. | *Hayes*, Order dated Dec. 13, 1973 (S.D. Ga.) | 55a |
| 13. | *Hamilton* v. *Seaboard Coast Line Railroad Company*, Order dated May 2, 1975 (S.D. Ga.) | 57a |
| 14. | *English*, Order dated Dec. 13, 1973 (S.D. Ga.) | 59a |
| 15. | *English*, Order dated Jan. 31, 1974 (S.D. Ga.) | 61a |
| 16. | *Hayes*, Order dated Mar. 22, 1974 (S.D. Ga.) | 67a |
| 17. | *Hayes*, Order dated Jul. 1, 1974 (S.D. Ga.) | 68a |
| 18. | Civil docket entries in *Hayes* (S.D. Ga.) | 72a |
| 19. | Civil docket entries in *Hamilton* (S.D. Ga.) | 86a |
| 20. | Transcript of hearing in *English*, Apr. 15, 1975 | 91a |




TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| Banker's Life & Cas. Co. v. Holland, 346 U.S. 379 (1953) | 12 |
| Boles v. Union Camp Corp., Civil No. 2804 (S.D. Ga., Savannah Div.) | 9 |
| Brown v. Topeka Board of Education, 347 U.S. 483 (1954) | 7 |
| Czuzka v. Rifkind, 160 F.2d 308 (2d Cir. 1947) | 10 |
| Electrical & Musical Industries, Ltd. v. Walsh, 249 F.2d 308 (2d Cir. 1957) | 10 |
| *In re* English, No. 75-1209 (5th Cir., Feb. 27, 1975) | 1 |
| English v. Seaboard Coast Line R.R., Civil No. 691 (S.D. Ga., Waycross Div.) | |
| 3 CCH EPD ¶ 8316 (S.D. Ga. 1971) | 3 |
| 4 CCH EPD ¶ 7505 (S.D. Ga. 1971), *aff'd as modif.*, 465 F.2d 43 (5th Cir. 1972) | 3 |
| 4 CCH EPD ¶ 7645 (S.D. Ga. 1972) | 4 |
| 5 CCH EPD ¶ 8018 (S.D. Ga. 1972) | 4 |
| 6 CCH EPD ¶ 8970 (S.D. Ga. 1973) | 4 |
| 6 CCH EPD ¶ 9033 (S.D. Ga. 1973) | 5 |
| 7 CCH EPD ¶ 9121 (S.D. Ga. 1974) | 5 |
| *Ex parte* Fahey, 332 U.S. 258 (1947) | 10 |
| Garan, Inc. v. Roydon, Wear, Inc., Civil No. 374-11 (S.D. Ga. 1974) | 8 |
| Hall v. St. Helena Parish School Board, Civil No. 1068 (E.D. La. ) | 7 |
| Hall v. West, 335 F.2d 481 (5th Cir. 1964) | 7, 10-11 |
| Hamilton v. Seaboard Coast Line R.R., Civil No. 474-69 (S.D. Ga., Savannah Div.) | 5 |
| Hayes v. Seaboard Coast Line R.R., Civil No. 2371 (S.D. Ga., Savannah Div.) | |
| 1 CCH EPD ¶ 9936 (S.D. Ga. 1968) | 2 |
| 46 F.R.D. 49, 1 CCH EPD ¶ 9953 (S.D. Ga. 1969) | 3 |
| 3 CCH EPD ¶ 8170 (S.D. Ga. 1971), *app. dism'd*, 3 CCH EPD ¶ 8320 (5th Cir., Misc. No. 2145, 1971) | 3 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 6 CCH EPD ¶ 8971 (S.D. Ga. 1973) | 4, 5, 10 |
| 7 CCH EPD ¶ 9248 (S.D. Ga. 1974) | 5 |
| 8 CCH EPD ¶ 9553 (S.D. Ga. 1974) | 5 |
| *Ex parte* Kawato, 317 U.S. 69 (1942) | 10 |
| Knickerbocker Ins. Co. v. Comstock, 83 U.S. (16 Wall.) 258 (1873) | 11 |
| Munn v. Seaboard Coast Line R.R., Civil No. 474-200 (S.D. Ga., Savannah Div.) | 8 |
| *Ex parte* Newman, 81 U.S. (14 Wall.) 152 (1872) | 11 |
| Platt v. Minnesota Min. & Mfg. Co., 376 U.S. 240 (1964) | 10 |
| Schwab v. Coleman, 145 F.2d 672 (4th Cir. 1944) | 10 |
| not yet assigned (S.D. Ga., Waycross Div.) | |
| Snowden v. Seaboard Coast Line R.R., Civil No. | |
| Stell v. Board of Public Education, Civil No. 1316 (S.D. Ga., Savannah Div.) | |
| 334 F.Supp. 909 (S.D. Ga. 1971) | 8 |
| 446 F.2d 904 (5th Cir.), *stay denied* (U.S., (1971) | 8 |
| 450 F.2d 880 (5th Cir. 1971) | 8 |
| Steward v. West, 449 F.2d 324 (5th Cir. 1971) | 10 |
| Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) | 8 |
| United States v. Hall, 145 F.2d 781 (9th Cir. 1944) | 10 |
| Wills v. United States, 389 U.S. 90 (1967) | 10 |
| Zerilli v. Thornton, 428 F.2d 476 (6th Cir. 1970) | 10 |


STATUTES AND RULES


| | |
|---|---|
| The All Writs Act, 28 U.S.C. § 1651 | 2, 9 |
| Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e *et seq.* | 2, 8, 9 |
| Rule 19, Supreme Court Rules | 12 |
| Rule 21(1), Supreme Court Rules | 12 |




TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES


| | Page |
|---|---|
| Bell, *The Federal Appellate Courts and the All Writs Act*, 23 SW.L.J. 858 (1969) | 10 |
| Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973) | 10 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

---

No. 74-1485

WILLIAM ENGLISH, JR.,

*Petitioner*

v.

HON. ALEXANDER A. LAWRENCE, Chief Judge, United States District Court for the Southern District of Georgia; SEABOARD COAST LINE RAILROAD COMPANY; and BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

*Respondents*

---

## BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

### OPINION BELOW

The Court of Appeals' opinion is as follows:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

(*In re William English, Jr.*, 5th Cir. No. 75-1209, Feb. 27, 1975 (*per curiam*).)

## QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit clearly abused its discretion in determining that the factual circumstances presented to it in petitioner's application for writ of mandamus were insufficient to compel issuance of the writ.

## STATUTORY PROVISION INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), as quoted in the Petition at p. 3, is the only relevant statute.

## STATEMENT OF THE CASE

On July 31, 1968, counsel for petitioner herein filed a class action against Seaboard Coast Line Railroad Company (SCL), the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), and two local lodges of BRAC. That action, styled as *Lorenzo Hayes, et al.* v. *Seaboard Coast Line Railroad Company, et al.*, S.D.Ga. (Savannah Division) Civil Action No. 2371, is a class action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, challenging the then-existing division of the craft of SCL employees represented by BRAC into two "Groups" or "Classes."

On December 9, 1968, the Court defined the class represented by Hayes and the five other named plaintiffs as: "Negro employes [of SCL] at or near Savannah who belong to or are eligible for membership in either of the two local defendant Brotherhoods by reason of job classification." *Hayes* v. *Seaboard Coast Line R.R.*, 1 CCH EPD § 9936 (S.D.Ga. 1968). A certified copy of that order is reproduced in the Appendix as Exhibit 1. (hereinafter, A-1). This order was supplemented on January 14, 1969 by an order adhering to the trial court's prior



determination to require notice to members of the class. 46 F.R.D. 49, 1 CCH EPD ¶ 9953 (S.D.Ga. 1969) [A-2]. A motion to certify the order for appeal was denied.

*Hayes* proceeded into discovery through 1969 and 1970, with the only significant activity in that case being SCL's efforts to secure responses to discovery directed to the plaintiffs. Meanwhile, on November 18, 1969, plaintiffs' counsel filed another action in the Waycross Division of the Southern District of Georgia. This second action, styled as *William English, Jr.* v. *Seaboard Coast Line R.R., et al.*, Civil Action No. 691, named SCL and BRAC, as defendants along with two different local lodges of BRAC.

On April 9, 1971, the court ruled in *Hayes* that individual white employees, whose seniority rights would be adversely affected should plaintiffs prevail, be joined as parties defendant. 3 CCH EPD ¶ 8170 (S.D.Ga. 1971) [A-3]. The *Hayes* action was therefore stayed until such time as the plaintiffs so amended their complaint. Plaintiffs' appeal was dismissed as untimely, 3 CCH EPD ¶ 8320 (5th Cir., Misc. No. 2145, Aug. 20, 1971) [A-4], and the stay remained in effect.

Counsel for plaintiffs in the two cases then devoted their attention to *English*. The class was certified as: "Negro employees of Seaboard Coast Line Railroad Company at or near Waycross, Georgia who belong to or are eligible for membership in either of the two defendant locals of BRAC, Number 5 and Number 1586, by reason of job classification." The question of joinder was reserved pending the *Hayes* appeal. *English* v. *Seaboard Coast Line R.R.*, 3 CCH EPD ¶ 8316 (S.D.Ga. Aug. 17, 1971) [A-5]. After the Fifth Circuit dismissed the *Hayes* appeal, a similar joinder order issued in *English*, 4 CCH EPD ¶ 7505 (S.D.Ga., Sept. 7, 1971) [A-6]. The *English*

action was stayed pending such joinder, and the plaintiff appealed.

While *English* was on appeal, the local lodges of BRAC were merged by court order dated January 28, 1972, 4 CCH EPD ¶ 7645 [A-7]. The Fifth Circuit's decision, affirming the joinder order as modified, issued on August 7, 1972. 465 F.2d 43, 4 CCH EPD ¶ 7931 (5th Cir. No. 71-3362) [A-8]. Orders on remand were issued by the trial court on September 1, 1972 (ordering plaintiff to amend), October 18, 1972 (joining the Transportation-Communication Employees Union as a defendant), and October 24, 1972 (ruling on all other outstanding motions and setting a trial date of January 8, 1973). 5 CCH EPD ¶ 8018 (S.D.Ga. 1972) [A-9].

SCL and BRAC negotiated an agreement, effective March 1, 1973, which merged Groups 1 and 2 on a date-of-hire "dovetail" basis, thereby providing the seniority relief requested by the plaintiffs in both *Hayes* and *English*. This agreement was incorporated into a system-wide injunction (thus affecting all employees of SCL represented by BRAC, regardless of their non-membership in either of the above-described classes) on November 16, 1973, 6 CCH EPD ¶ 8970 (S.D.Ga.) [A-10]. On the same day, the stay in *Hayes*, now two and one-half years old by virtue of plaintiffs' inaction in that case, was dissolved as moot. 6 CCH EPD ¶ 8971 (S.D.Ga.) [A-11].

Plaintiffs in *Hayes* then attempted to amend their complaint to join an additional defendant the United Transportation Union (UTU), on grounds that two of the *Hayes* plaintiffs wished to become switchmen. Leave so to amend was denied by order dated December 13, 1973, 6 CCH EPD ¶ 9032 [A-12]. The two plaintiffs involved, Uley Hamilton and Godfrey M. Davis, later filed a separate action against SCL and UTU on April 18, 1974;



this case, Savannah Division Civil Action No. CV474-69, was tried on May 5, 1975. Prior to that, however, an additional plaintiff Booker T. Snowden, sought to intervene in the case. After the conclusion of two lengthy hearings, his case was transferred with the concurrence of all counsel to the Waycross Division. [A-13]. Post-trial submission of briefs and additional evidence are now pending in *Hamilton*.

In light of the systemwide nature of the injunctive order, SCL moved for expansion of the class to encompass all black, former Group 2 employees of SCL; this motion was taken under advisement by the trial court by order dated December 13, 1973. *English* v. *Seaboard Coast Line R.R.*, 6 CCH EPD ¶ 9033 (S.D.Ga.) [A-14]. The injunction was modified by order dated January 31, 1974 in *English*, 7 CCH EPD ¶ 9121 (S.D.Ga.) [A-15]; that order incorporated an agreement providing fallback seniority rights to transferring employees whose transfers were not completed. Then, on March 22, 1974, *English* and *Hayes* were consolidated, 7 CCH EPD ¶ 9248 (S.D.Ga.) [A-16].

Seniority relief for former employees of the Savannah Union Station Company (which had been dissolved in 1962) was provided by order in *Hayes* dated July 1, 1974, 8 CCH EPD ¶ 9553 (S.D.Ga.) [A-17]. SCL then renewed its motion to compel answers to interrogatories in *Hayes*. (Answers were due on December 19, 1973. See 6 CCH EPD ¶ 8971 [A-11].) The Court ordered that answer be made on or before August 31, 1974, but no answers have yet been filed despite a show-cause hearing on October 1, 1974.

On August 22, 1974, petitioner's lead counsel of record, Jack Greenberg, Esq., wrote a letter to Chief Judge John R. Brown of the Fifth Circuit, asserting that "the determination of the rights of hundreds of other persons

depends on obtaining a decision in *English*."[1] By personal letter to Mr. Greenberg on September 11, 1974, Chief Judge Brown assured Mr. Greenberg that he (Chief Judge Brown) had made inquiry and was satisfied that Judge Lawrence was "doing the best that is possible." Nonetheless, a petition for writ of mandamus was filed with the Fifth Circuit on January 23, 1975. That Court directed that the Clerk *request* Judge Lawrence to file a response to the petition.[2]

The Court of Appeals denied mandamus on February 27, 1975. Both SCL and BRAC filed motions to dismiss the petition. (On February 20, 1975, that Court amended its rules by adding Rule 22, which forbids extraordinary writs bearing the name of the district judge and further states that, "unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.") Rehearing was not sought by the petitioner, but these proceedings were instituted seeking certiorari.

## ARGUMENT

### I. THE TRIAL COURT'S HANDLING OF THIS CASE IS JUSTIFIED BY THE FACTS.

As the foregoing factual discussion demonstrates, the handling of this case and its sister cases can hardly be characterized as "inaction." Petitioner's *ad hominem* at-

---

[1] This position is somewhat anomalous in light of opposition by plaintiffs' counsel to expansion of the class.

[2] Petitioner contends in his statement of the "Question Presented" that an answer was "directed." This is a misstatement. Moreover, it is unfair to criticize Judge Lawrence's failure to respond to the petition when Chief Judge Brown had already informed Mr. Greenberg that Judge Lawrence bore a "tremendous caseload." The mandamus proceeding would be yet another such case.



tacks upon the trial court cannot be allowed to obscure the fact that plaintiff English, as well as the hundreds of black employees of SCL who formerly held seniority in Group 2 of the clerical craft, had full opportunity to bid on former Group 1 positions since merger of the two groups effective March 1, 1973, and to utilize hire-date seniority to do so. The docket entries for the time period since trial in *English* fill more than a page, while *Hayes* and *Hamilton*, both of which are parallel and overlapping actions, fill some six pages more. [See A-18 and A-19].

Petitioner's argument strays far from the mark in accusing the trial court of "a substantial nullification of Title VII in the Southern District of Georgia." The contrast between *Hall* v. *West*, 335 F.2d 481 (5th Cir. 1964), and the facts here before the court is striking: *Hall* is one of a host of judicial opinions arising from the "massive resistance" campaign against school desegregation in Louisiana.[3] The complaint in *Hall* v. *St. Helena Parish School Board* was filed a year before this Court's decision in *Brown* v. *Topeka Board of Education*, 347 U.S. 483 (1954), yet no hearings were held for ten years. This total lack of judicial action caused the Fifth Circuit to conclude that the "drastic and extraordinary remedy" of mandamus was necessary to compel the district court to order injunctive relief to disestablish the dual system of schools in the parish.

*English* is a different case: no injunction is now necessary, because injunctive relief has been granted, there is no more Group 1/Group 2 division, and the BRAC lodges have been unified. All that remains to be determined is back pay claims and attorneys' fees. Numerous hearings have been held, and no less than ten orders

---

[3] Petitioners' attorneys Greenberg and Nabrit, having been counsel of record in all the Louisiana cases, are fully aware of the factual distinctions between *Hill* and the case at bar.

have issued in the *English-Hayes-Hamilton* trilogy since trial on the merits in *English*.

That Judge Lawrence follows the law in Civil Rights matters can be ascertained for example by reference to the record in *Stell* v. *Board of Public Education*[4]—in which petitioner's counsel represented the plaintiff.[5]

As Judge Lawrence observed in *Garan, Inc.* v. *Roydon Wear, Inc.*, Civil No. 374-11 (S.D. Ga. 1974) at p. 3, n.3, the trial court is twenty-fourth among all districts in the Nation in terms of civil filings per judge. An overwhelming proportion of these are cases required to be "expedited" or "given highest priority." This category of cases encompasses cases arising under the Civil Rights Act of 1866, 1871, 1957, 1964, and 1968; actions pursuant to the Consumer Credit Protection Act; cases seeking injunctive relief; *in rem* actions in admiralty; prayers for the convening of a three-judge court; various administrative appeals; school desegregation cases; and habeas corpus actions. During 1973 and 1974, Judge Lawrence issued at least 141 written opinions in such expedited cases, not to mention the additional category of criminal cases which must be given priority due to the constitutional mandate of speedy trial.

It may further be observed that petitioner's counsel appear as counsel of record in thirteen cases in the Savannah Division alone which have been filed subsequent to the *English* trial; only one of these (*Munn* v. *Seaboard Coast Line R.R.*, an FELA action) is not a case which

[4] *See, inter alia*, 334 F.Supp. 909 (S.D. Ga. 1971); 446 F.2d 904 (5th Cir. 1971), *stay denied*; 450 F.2d 880 (5th Cir. 1971).

[5] During the course of *Stell*, Judge Lawrence was hung in effigy, attacked in the press, subjected to harassment both on the bench and at his home, and burdened by a wide variety of efforts to circumvent the mandate of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).



must be expedited. Thus, in effect, petitioner's counsel offer no constructive solution to the trial court's burden, but instead visit upon that court yet an additional imposition via these proceedings.

Having remedied petitioner's complaint with injunctive relief, the trial court apparently feels that further orders are of less consequence in *English* than in cases yet unresolved. Nor is it accurate that the district court "has not indicated when, or whether, the case will ever be decided;" at a hearing on April 15, 1975, concerning SCL's pending motion for expansion of the class, Judge Lawrence again reiterated his intention to render decision in *English* imminently [A-20]. With trial set to commence in *Boles* v. *Union Camp Corp.* in early June,[6] it is difficult to determine what time is available for the court to devote to opinion writing; nonetheless, it seems apparent that time occupied in responding to letters and petitions would further delay decision rather than serving to "expedite the case in every way."

## II. THE COURT OF APPEALS DID NOT ERR IN DENYING PETITIONER'S APPLICATION FOR MANDAMUS.

Petitioner asserts that the extraordinary relief demanded by him from the Court of Appeals was mandated by the "expediting" provisions of the 1972 Amendments to Title VII of the Civil Rights Act of 1964 and by the All Writs Act. A simple reading of the former evidences its total lack of applicability to the case at bar; hence, the All Writs Act, 28 U.S.C. § 1651, is the only statutory authority for the relief prayed.

[6] Another Title VII case filed by counsel for petitioner, Civil No. 2804 (S.D. Ga). Rumor has it that this case may have been settled in part, but plaintiff's counsel have refused to inform SCL's counsel as to the accuracy of that rumor.

However, as this Court cautioned in *Platt* v. *Minnesota Min. & Mfg. Co.*, 376 U.S. 240, 245 (1964), "extraordinary writs are reserved for really extraordinary causes," *quoting*, *Ex parte Fahey*, 332 U.S. 258, 260 (1947). And as further observed in *Wills* v. *United States*, 389 U.S. 90 (1967), the familiarity of a court of appeals with the practice of individual district courts within its circuit is relevant to the assessment for the need for mandamus. In response to the petition below, SCL pointed out that none of the four cases relied upon by petitioner [7] could be read to support the proposition that mandamus is available "to compel a federal district judge to make a decision on the merits of his case."

BRAC's response cogently set forth the need for a petitioner to make "a strong showing of the necessity for such relief," [8] also noting that mandamus is available "only where there are exceptional circumstances amounting to a judicial usurpation of power." [9] Now, before this Court, petitioner has abandoned his reliance upon all of the cases previously cited except *Kawato* and *Schwab* (included in a thirteen-case string citation which lists only one decision rendered within the last twenty-four years), and instead contends that there are four controlling authorities: Judge Parker's statements to a Congressional Committee; *Hall* v. *West*, 335 F.2d 481

[7] Ex parte Kawato, 317 U.S. 69 (1942), Czuzka v. Rifkind, 160 F.2d 308 (2d Cir. 1947), United States v. Hall, 145 F.2d 781 (9th Cir. 1944), and Schwab v. Coleman, 145 F.2d 672 (4th Cir. 1944)—all of which were decided prior to amendment of the All Writs Act in 1949.

[8] *Citing*, Stewart v. West, 449 F.2d 324 (5th Cir. 1971).

[9] Wills v. United States, 389 U.S. 90 (1967); Zerilli v. Thornton, 428 F.2d 476 (6th Cir. 1970). *See also*, Electrical & Musical Industries, Ltd. v. Walsh, 249 F.2d 308 (2d Cir. 1957); Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973); Bell, *The Federal Appellate Courts and the All Writs Act*, 23 SW. L. J. 858 (1969).



(5th Cir. 1964); *Knickerbocker Ins. Co.* v. *Comstock*, 83 U.S. (16 Wall.) 258 (1873); and *Ex parte Newman*, 81 U.S. (14 Wall.) 152 (1872). None of these control the issues *sub judice*.

This Court's decisions in *Knickerbocker* in 1873 and in *Newman* in 1872 likewise fail to support petitioner's argument. In *Knickerbocker*, the district court conducted a jury trial in a bankruptcy action; the company was adjudged bankrupt, whereupon its appeal to the Circuit Court was dismissed for want of jurisdiction. Since the Circuit Court had not passed upon the company's objections, mandamus was deemed proper but the writ of error was dismissed. In granting mandamus, this Court was exercising its inherent powers to issue an order compelling the appellate court to act; it was *not*, as petitioner here seeks, ordering the appellate court to redetermine issues already resolved against the petitioner.

*Newman*, conversely, *denied* mandamus [10] the quotation included by petitioner conveniently omits the entire *ratio decidendi* of that case: that the Supreme Court will not undertake second-hand direction of actions of a trial court which have already been reviewed by the Court of Appeals. 81 U.S. (14 Wall.) at 169-170.

*Hall* has been fully discussed *supra*, and is clearly inapplicable to the case at bar. Judge Parker's testimony [11] simply states that where mandamus is sought the Court of Appeals is empowered to act should the facts presented justify appellate intervention; it does *not*, even taken out of context in the manner adopted by petitioner, support the proposition that this Court should intervene after the Court of Appeals has seen no need to do so.

[10] The opinions in both *Knickerbocker* and *Newman* were written by Mr. Justice Clifford.

[11] Quoted in petitioner's petition at p. 11.

## III. PETITIONER HAS SHOWN NO GROUNDS SUFFICIENT TO JUSTIFY THE GRANTING OF HIS PETITION FOR CERTIORARI.

The hurdle before petitioner is far higher than he would admit: not only must it be shown that mandamus was required by the facts *as presented to the Court of Appeals*, but also it must appear that the Court of Appeals "has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." *Cf., Banker's Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1953), and Rule 19, S.CT.Rules.

In order that this Court could reach such a determination, it is submitted that a review of the record below would be mandated (as is in fact contemplated by Rule 21(1) of the Court); such a withdrawal of the record would delay, rather than expedite, the trial court's decision.

## CONCLUSION

Thus, petitioner must, in order to secure a writ of certiorari, establish the following prerequisites:

(1) it must be shown that the trial court's failure to issue a decision was wholly unjustified; (2) it must be determined that this delay was so exceptional as to constitute a judicial usurpation of power; (3) it must appear that the denial of mandamus by the Court of Appeals was a clear and apparent abuse of that court's discretion; and (4) such an abuse of discretion must be a departure from the accepted and usual course of judicial proceedings which is so flagrant that this Court should step in in a supervisory capacity to order the Court of Appeals to order the trial court to issue an order to provide relief which has already been provided.



Petitioner has failed to satisfy the Court of Appeals as to points (1) and (2), and has not set forth any allegations sufficient to meet tests (3) and (4). Consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN W. WELDON
EDWARD A. CHARRON
SEABOARD COAST LINE RAILROAD COMPANY
500 Water Street
Jacksonville, Florida 32202

HUNTER, HOULIHAN, MACLEAN, EXLEY, DUNN & CONNERAT, P. C.
MALCOLM R. MACLEAN
CHARLES A. EDWARDS
Post Office Box 9848
Savannah, Georgia 31402